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No. 93-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SAMUEL LEWIS, Director,
Arizona Department of Corrections, et al.,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA,
Respondent,

MICHAEL EMERSON CORRELL,
JOSÉ ROBERTO VILLAFUERTE, JIMMY ALLAN ARNETT,

Real Parties in Interest.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the law provide a remedy for the failure of a District Court in a habeas corpus case to fulfill its duty under *In re Blodgett* "to take all steps necessary to ensure a prompt resolution of the matter . . ."?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in the above captioned case. Counsel for petitioner has consented, but respondent court and counsel for the real parties in interest have not consented.

In the accompanying brief, *amicus* argues that the state has been wronged by the inexcusable delay in this case and that mandamus is the appropriate relief. Further, review of this case on certiorari is necessary to eliminate the gross disparities in justice between districts

which process their habeas cases and those which obstruct them.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The federal district courts in Arizona have needlessly delayed enforcement of the state's death penalty, reducing its deterrent effect. This delay is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reason, *amicus* requests leave to file its brief.

October, 1993

Respectfully submitted,

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Criminal Justice Legal Foundation

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Real parties in interest Correll, Villafuerte, and Arnett have all been convicted of murder and sentenced to death in the state courts of Arizona. All three sentences have been affirmed by the Supreme Court of Arizona. All three have filed habeas corpus petitions with respondent U. S. District Court for the District of Arizona. In all three cases, a motion for summary judgment has been pending for over a year.

The Arizona Attorney General petitioned the Court of Appeals for the Ninth Circuit for a writ of mandamus to compel action. That court denied the writ without any explanation.

On September 15, 1993, after the present certiorari petition was filed, the District Court set a date for an evidentiary hearing in *Arnett* but did not rule on the pending summary judgment motion. Also, on September 29, 1993, the District Court granted the state's motion for summary judgment in *Villafuerte*. Writ relief is no longer needed as to *Villafuerte*, see *Connor* v. *Coleman*, 441 U. S. 792 (1979), and there is a question as to mootness in *Arnett*. This brief will not address that question, as we understand it will be covered in other briefs to be submitted. In any event, there certainly remains a live controversy as to *Correll*.

JURISDICTION

The Court of Appeals had jurisdiction to issue the writ of mandamus under the All Writs Act, 28 U. S. C. § 1651(a). Issuance of the writ to an inferior court, as opposed to an executive officer, is an exercise of appellate jurisdiction. *Ex parte Crane*, 5 Pet. (30 U. S.) 190, 193 (1831); cf. *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 175-176 (1803).

The Court of Appeals has jurisdiction to issue writs in cases within its appellate jurisdiction, even though no appeal has yet been perfected. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25 (1943). This case is within that appellate jurisdiction. 28 U. S. C. § 2253.

The writ of certiorari is the appropriate method for this Court to review denial of a writ of mandamus, either under 28 U. S. C. § 1254(1), or under the All Writs Act, *McClellan* v. *Carland*, 217 U. S. 268, 277-278 (1910). R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 499 (6th ed. 1986).

SUMMARY OF ARGUMENT

The people of Arizona are entitled to a prompt disposition of these cases, both by law and as a matter of fundamental justice. Such promptness is feasible if the habeas court recognizes the limited, secondary nature of habeas corpus and properly applies the limitations on habeas relief.

The present case lies within the solid core of the historical writ of mandamus. The injustice being perpetrated here is precisely the kind which has historically justified issuance of the writ.

Certiorari is needed in this case to correct the disparities in the quality of justice which now exist between districts. Some states can enforce their capital punishment statutes while others cannot, based on the attitudes of the local federal bench rather than any genuine differences in their legal situations.

ARGUMENT

I. Law and justice require prompt disposition of capital habeas cases.

A. Justice Delayed.

"To none will we sell, to none deny *or delay*, right or justice." Magna Carta, Art. 40 (1215) (emphasis added). Delay of justice is a form of oppression, and it has been since ancient times. For this reason, a promise of swift justice was included in the cornerstone of Anglo-American liberty.

Similarly, a right to a speedy trial was included in the American Bill of Rights. U. S. Const., Amdt. 6. At the time of its enactment, this provision applied only to the federal government, and to this day it only benefits the defendant. At the time of enactment, there was no reason to apprehend that the federal courts would

obstruct justice to the detriment of the people. Only much later did the pendulum swing so far that it was even necessary to be concerned about fairness to the people. See *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934) (justice due also the accuser); *Witherspoon* v. *Illinois*, 391 U. S. 510, 535 (1968) (Black, J., dissenting) (people entitled to impartial jury).

While the Sixth Amendment speedy trial right does not apply directly to the prosecution, the principle of right and justice which underlies it applies fully. It is fundamentally wrong to drag out justice for decades, and that wrong is no less wrong when it is inflicted upon the original victim of the crime, the victim's family, or society as a whole, rather than on the defendant.

Ideal justice would provide for the sentence to be carried out immediately upon the entry of the verdict, and at common law there was only a short interval. 4 W. Blackstone, Commentaries 397 (1769). In modern times, however, recognition of the imperfections of the trial process has resulted in the creation of a multilayered system of review, so that execution of sentence is delayed for years after the completion of trial.

The fact that some delay is required, however, must not blind us to the injustice of delay. Each day that a valid sentence is delayed is a fresh injury. Each day, the family of the victim must live with the uncertainty of whether justice will ever be done. Each day raises the possibility of new crimes by the criminal, either within prison, see *Arave* v. *Creech*, 123 L. Ed. 2d 188, 195, 113 S. Ct. 1534, 1538 (1993), after escape, see *Tison* v. *Arizona*, 481 U. S. 137, 139-141 (1987), or by arrangement with persons on the outside, see *People* v. *Allen*, 42 Cal. 3d 1222, 1236-1244, 729 P. 2d 115, 120-125 (1986). Each day is an incremental loss in the deterrent effect.

When a federal court directly interferes with the enforcement of a state judgment, it takes a grave step. For this reason, Congress passed the Anti-Injunction Act,

flatly forbidding such interference, subject only to a few, narrow exceptions. *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 286-287 (1970).

Habeas corpus is one of the exceptions. 28 U. S. C. § 2251. This does not mean, however, that the stay of state proceedings is a matter to be taken lightly. Instead, as this Court has repeatedly recognized, the stay creates an obligation on the part of the federal court to proceed promptly. *In re Blodgett*, 116 L. Ed. 2d 669, 674-675, 112 S. Ct. 674, 676 (1992).

Justice delayed is justice denied. The District Court has an obligation to the people of Arizona to minimize the injustice.

B. Habeas Corpus: Secondary and Limited.

The trial of a capital case is a grave matter, requiring the highest degree of care. But the federal district court is not trying these cases. That jurisdiction is vested in the superior courts of Arizona, Ariz. Const., Art. 6 § 14(4) (Supp. 1992), and the trials were completed years ago.

Review on appeal of a capital case is an equally grave matter, and appellate review is an essential part of a constitutional system of capital punishment. See *Pulley* v. *Harris*, 465 U. S. 37, 49 (1984). Again, however, that jurisdiction is not vested in the federal district court. It is vested in the Supreme Court of Arizona, Ariz. Rev. Stat. Ann. § 13-4031 (Supp. 1992), subject to this Court's review on federal questions, 28 U. S. C. § 1257(a).

"The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983); accord, *Brecht* v. *Abrahamson*, 123 L. Ed. 2d 353, 370, 113 S. Ct. 1710, 1719 (1993). Hence, this Court has endeavored to "confin[e] collateral relief to cases that involve *fundamental* defects or omissions inconsistent with the *rudimentary* demands of fair procedure." *Brecht*, 123 L. Ed. 2d, at 375, 113 S. Ct., at 1723 (Stevens, J., concur-

ring) (emphasis added). Because of this secondary, limited role, there are a number of limitations on habeas corpus which, when *properly* applied, serve to whittle down the issues which actually require decision in the district court to a scope considerably smaller than those which need to be considered by the state courts.[1]

First, questions of state law are not proper subjects of federal habeas review at all. *Estelle* v. *McGuire*, 116 L. Ed. 2d 385, 396, 112 S. Ct. 475, 480 (1991). Second, the presence of a single claim which has not been presented to the state courts and which is not barred there requires dismissal of the entire petition. *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982). If the claim is barred, it may not be considered except in the rare cases where an "objective factor external to the defense" prevented its timely presentation, *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986), or the extremely rare cases where the defendant is actually innocent, *id.*, at 496.

Habeas review is thus limited, for the most part, to federal constitutional claims already presented to and passed on by the state courts. Even within this restricted scope, the issues to be decided are confined on both ends by the limited nature of habeas review.

On questions of fact, the law requires deference to the state court findings, absent an applicable exception. The petitioner's negligence in developing his case is not one of the exceptions. As with procedural default, an objective, external factor is generally required. *Keeney* v. *Tamayo-Reyes*, 118 L. Ed. 2d 318, 330, n. 5, 112 S. Ct. 1715, 1720 (1992).

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1. We emphasize "properly" because evasion of these limits results in the needless multiplication of issues. For example, if the procedural default rule is properly applied, the vast majority of claims not made on appeal need not be considered on habeas. If the rule is evaded, however, the habeas court must both attempt to justify the evasion and rule on the merits of the claim.

Much more importantly for the present case, the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) severely limits the issues of law to be decided. In each of the three underlying cases, the long-delayed ruling is on a motion for summary judgment. See Pet. Cert. 6, 7, 8. Such a motion necessarily presents questions of law based upon facts not genuinely in dispute. See Federal Rule of Civil Procedure 56(c); *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 258 (1986).

The *Teague* question is addressed as a threshold issue. *Teague*, *supra*, 489 U. S., at 316. If the question is one of "pure law," as opposed to a mixed question of law and fact, the district court's task under *Teague* is not to resolve the difficult and subtle nuances of constitutional doctrine, but instead to ask whether reasonable minds could differ, *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990), a much more straightforward question. If the merits of the question are difficult, it is "susceptible to debate among reasonable minds," *ibid.*, and the rule petitioner seeks would be a "new rule."

The principal questions of law in habeas corpus, then, are in the mixed questions of law and fact. Because there was no majority opinion in *Wright* v. *West*, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992), it would appear to be the law for the time being that the district court must review the "mixed questions" *de novo*. See, *e.g.*, *Strickland* v. *Washington*, 466 U. S. 668, 698 (1984).

These questions may be subtle and difficult, and *amicus* does not seek to minimize the importance of the district court's decision. The issue here is how much time is required to decide these questions, and for this purpose it is important to bear in mind that these issues will be redecided *de novo* on appeal. *Adams* v. *Peterson*, 968 F. 2d 835, 843 (CA9 1992) (en banc). Furthermore, a district court judge does not need to circulate drafts and put together a majority, as appellate court judges do. The judge need only explain his or her own reasoning and

decide the issues. The judge should therefore be able to decide more quickly than an appellate court.

C. Habeas Statutes and Rules.

The statutes and rules governing habeas corpus shed some light on the amount of time which should be required for a decision:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall *forthwith* award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.
>
> "The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be *returned within three days* unless for good cause additional time, not exceeding twenty days, is allowed.
>
> "The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.
>
> "When the writ or order is returned a day shall be set for hearing, *not more than five days* after the return unless for good cause additional time is allowed.
>
> "Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.
>
> "The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.
>
> "The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

> "The court shall *summarily* hear and determine the facts, and dispose of the matter *as law and justice require*." 28 U. S. C. § 2243 (emphasis added).

It is evident from this statute that Congress intended that habeas corpus be a speedy proceeding. Times are stated in days, not months and certainly not years. These specific times are no longer practical, given the complexity of the issues now deemed cognizable on habeas. Yet the statute still stands as an unmistakable declaration that habeas corpus should be a summary procedure.

The specific times stated in section 2243 have now been superseded by the Rules Governing Section 2254 Cases in the United States District Courts, cited below as the "Habeas Rules." Habeas Rule 8(c) requires a hearing "as promptly as practicable."

"[S]ubdivision (c) provides more flexibility [than section 2243] to take account of the complexity of the case, the availability of important materials, the workload of the attorney general, and the time required by appointed counsel to prepare." Advisory Committee's Note to Habeas Rule 8, 28 U. S. C., p. 425 (1988 ed.).

While the Habeas Rules provide some needed flexibility, they do not purport to alter the basic nature of the proceeding. The Congressional command to "*summarily* . . . dispose of the matter as law and justice require," 28 U. S. C. § 2243 (emphasis added), remains in force. Justice requires that justice not be unnecessarily delayed.

D. Reasonable Time.

The key question remains, what amount of time is reasonable to dispose of a habeas corpus petition? Guidelines established for civil disputes are instructive for establishing some outer limits.

Ordinary civil litigation deals with raw disputes, while federal habeas corpus warms over material which is already overcooked by the time it reaches federal court.

Hence, habeas corpus cases should be processed from start to finish in *less* time than original civil cases.

The National Conference of State Trial Judges has established a standard for the disposition of general civil matters:

> "A. General Civil—90% of all civil cases should be settled, tried or otherwise concluded within 12 months of the date of case filing; 98% within 18 months of such filing; and the remainder within 24 months of such filing except for individual cases in which the Court determines exceptional circumstances exist and for which a continuing review should occur."

National Conference of State Trial Judges, Standards Relating to Court Delay Reduction § 2.52, at 11 (1985). Along the same lines, Congress has set a standard of 18 months from the filing of a raw dispute to the commencement of trial in most civil cases. 28 U. S. C. § 473(a)(2)(B).

Death penalty law is complex, to be sure, but so are antitrust, securities, and RICO. If these cases can be resolved in a year or two from the filing of a raw dispute, the secondary, limited, re-review of warmed-over disputes on habeas corpus can surely go at least as fast.

In the cases underlying the present petition, the district court has taken longer to rule on summary judgment motions than it should take to dispose of the case from start to finish. The District Court took a year and a half to rule on a summary judgment motion in *Villafuerte*. Pet. Cert. 7. Motions have been pending for a year in *Correll*, Pet. Cert. 6, and over a year in *Arnett*, *id.*, at 8. The latter case, altogether, has been pending on habeas corpus an *entire decade*. *Id.*, at 7. That is absolutely inexcusable.

The people of Arizona have a right to reasonably prompt handling of these cases. That right has been violated. The only question is whether the law affords a remedy. It does: the writ of mandamus.

II. The present case is a textbook example of an appropriate case for mandamus.

For centuries, the writ of mandamus has been the law's remedy for "refusal or neglect of justice." 3 W. Blackstone, Commentaries 109 (1768).

> "A *mandamus* therefore lies . . . to compel the holding of a court . . . . [I]t issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, *whenever the same is delayed*. For it is the peculiar business of the court of king's bench, to superintend all other inferior tribunals . . . and this, not only by restraining their excesses, *but also by quickening their negligence, and obviating their denial of justice*." *Id.*, at 110-111 (emphasis added).

When Congress first established the courts of the United States, it expressly authorized this Court "to issue writs of mandamus, (d) in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." Judiciary Act of 1789, § 13, 1 Stat. 81. With no more precise direction from the legislative branch, this Court looked for guidance to the common law, and for guidance on the common law, the Court looked to Blackstone. Thus, in *Ex parte Crane*, 5 Pet. (30 U. S.) 190, 192 (1831), Chief Justice Marshall set forth the function of the writ by quoting the above passage from Blackstone.

From the beginning, it has been the core function of the writ of mandamus to compel the lower court to decide when it has improperly failed to do so. Mandamus is, of course, not a substitute for appeal, *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943), but if the lower court never rules, there will never be an appeal. Thus in *Ex parte Bradstreet*, 7 Pet. (32 U. S.) 634, 647-648 (1833), this Court granted mandamus to a district judge to reinstate and try a case, because otherwise the plaintiff would have

been deprived of her right to bring the case up on appeal. In *Livingston* v. *Dorgenois*, 7 Cranch (11 U. S.) 577, 579-580 (1813), the district court had "finally stayed" the action at the request of the government, which was not a party. The Court issued "*mandamus nisi* . . . in the nature of a *procedendo*" to compel trial of the case. *Id.*, at 589.

Life and Fire Ins. Co. v. *Heirs of Wilson*, 8 Pet. (33 U. S.) 291 (1834) noted the special need for mandamus to resolve the predicament of the litigant in a case where the judge refuses to enter judgment. Mandamus "is the only adequate mode of relief, where an inferior tribunal refuses to act upon a subject brought properly before it." *Id.*, at 303. The Court issued the writ to compel a judge to sign a judgment previously rendered. *Id.*, at 304.

There are many cases in which this Court has held mandamus to be improper, yet these decisions uniformly acknowledge the core function of mandamus as set forth in Blackstone and the cases discussed above. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21 (1943) contains one of the more extensive discussions of the writ of mandamus. *Roche* notes that where the question will ultimately be reviewable on appeal, appellate courts will not review the question by mandamus. *Id.*, at 26. However, *Roche* explicitly distinguishes the situation of "a refusal by the district court to adjudicate issues properly presented to it," in which case mandamus is appropriate. *Id.*, at 27.

Thermtron Products, Inc. v. *Hermansdorfer*, 423 U. S. 336 (1976) addresses the failure of a district court to accept a case merely because of the crowded state of its docket. In that case, the district court remanded a diversity case to state court solely for that reason. *Id.*, at 340-341. The *Thermtron* Court reviewed the cases on mandamus and stated that "these cases would support the use of mandamus to prevent nullification of the removal

statutes by remand orders resting on grounds having no warrant in the law." *Id.*, at 353.[2]

In the present case, the district court has effectively nullified a law vastly more important than the removal statutes. The prohibition and punishment of murder is far and away the single most important function of state government. See *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983). The district court has, in effect, made a mockery of that law, at best because it is too busy, at worst out of deliberate obstruction. Mandamus is proper to enforce the prisoner's right to speedy consideration of a habeas petition, *Johnson* v. *Rogers*, 917 F. 2d 1283 (CA10 1990), and it is no less proper for the benefit of the people.

In relatively recent history, there has been a controversial expansion of the use of mandamus for "supervisory" and "advisory" functions. See 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3934, at 228-242 (1977). The present petition does not depend on that extension. It falls squarely within the solid core of the traditional, centuries-old writ. "[I]f a judge simply delays too long in deciding a pending case, a writ may issue on the ground that undue delay is tantamount to failure to exercise jurisdiction." *Id.*, § 3933, at 223.

III. Certiorari is necessary to prevent gross disparities in the quality of justice.

In the preceding two parts, *amicus* has discussed why the Court of Appeals should have issued a writ of mandamus. The more immediate question is why this Court should grant a writ of certiorari to review that decision.

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2. There is a dissent in *Thermtron*, but it is based solely on a special statute for removal cases, not pertinent here. *Id.*, at 353-361 (opinion of Rehnquist, J.).

Supreme Court Rule 10.1 lists some of the reasons why certiorari may be granted, among them being: "(a) When a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, *or sanctioned such a departure by a lower court*, as to call for an exercise of this Court's power of supervision." (Emphasis added.)

That statement applies to the present case, and the departure is reason enough to grant certiorari. Yet the problem here is deeper and more intense than this general statement conveys. What is at stake here goes to the heart of the role of the judiciary in a democratic society.

It is now settled beyond question (if there ever had been a *bona fide* question) that capital punishment does not violate the Federal Constitution. *Gregg* v. *Georgia*, 428 U. S. 153 (1976). The people of Arizona therefore have the indisputable constitutional right to decide for themselves the state law question of whether murder will be punishable by death. See U. S. Const. Amdt. 10. The people of each of the other states have the same right, to be exercised through the democratic process.

In reality, though, whether a state or district does or does not have capital punishment is now determined as much by the composition of the local federal bench as it is by the democratic process. If a district court can grant a stay of execution and then sit on the case forever, whether intentionally or negligently, capital punishment is abolished as effectively as if it were repealed by the legislature. Indeed, it is more completely abolished, for while legislators can be voted out, federal judges cannot. See *McGautha* v. *California*, 402 U. S. 183, 226 (1971) (Black, J., concurring).

In the absence of appellate control, this judicial sit-down strike will result in pockets across the country where *Gregg* is effectively overruled by district courts. One state

or district will have capital punishment in fact, while the next will have it in name only.

The law should not vary radically from one district to the next because of the composition of the district bench. That is precisely why we have a Supreme Court, to establish a reasonable uniformity in the law. The Federalist No. 22, p. 150 (C. Rossiter ed. 1961). Usually, that uniformity is obtained by settling questions of substantive and procedural law. Occasionally, however, it must be obtained by "exercise of this Court's power of supervision." Supreme Court Rule 10.1(a).

This is one of those occasions.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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